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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. APRIL M. SOMA, Defendant and Appellant.	B204682 (Los Angeles County Super. Ct. No. LA047889)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

April Soma appeals from her conviction of the murder of her husband, Michael Soma. She argues that admission of Michael's statements to police officers about her abuse of him in a prior incident constituted a violation of her right to confrontation under principles announced in *Crawford v. Washington* (2002) 541 U.S. 36 (*Crawford*). She also challenges the instructions on self defense and claims the trial court erred in overruling her objection to the testimony of a prosecution expert witness.

We conclude the trial court violated appellant's right to confrontation by admitting Michael's statements about the prior abuse, but find the error harmless beyond a reasonable doubt. We find no instructional error. Nor did the trial court abuse its discretion in overruling appellant's objection to testimony by the prosecution expert witness.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and Michael met in 1994 and married in 2001. Their relationship was marked by repeated incidents of domestic violence, with each spouse inflicting injury on the other. On New Year's Eve 2004, Deputy Sheriff Stephen Rotella responded to a call reporting that a woman possibly had killed her baby at a specific address in Agoura Hills. Arriving at the scene, Deputy Rotella found blood, a shotgun case, and a large caliber handgun with all rounds fired. He went outside and heard a scream from across the street. He went across the street and found appellant lying on the ground on top of a shotgun with Michael lying dead next to her. He asked appellant what had happened. She said "'I shot him.'" She explained that first she shot Michael with a "45" and then chased him and shot him with the shotgun.

Deputy Sheriff Rodney Loughridge responded to the scene and saw appellant lying next to Michael. As he approached, she spontaneously said: "'I killed him. I killed him. I shot him.'" She repeated this admission spontaneously while waiting in the patrol car. Appellant waived her rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and Deputy Loughridge tape recorded her statement. On the ride to the sheriff's station,

appellant spontaneously stated that she shot Michael twice inside the house, and then shot him in the eye outside the house.

Appellant was arrested and charged with one count of murder with firearm use enhancements. Her first trial ended in mistrial. She was tried again and found guilty as charged. She was sentenced to an aggregate term of 50 years to life in prison. This timely appeal followed.

DISCUSSION

I

Appellant argues that admission of statements made by Michael about an incident in Las Vegas in February 2004 violated her Sixth Amendment right to confrontation under *Crawford, supra,* 541 U.S. 36. Security personnel at Caesars Palace responded to a domestic disturbance call at the Soma room. Michael was bloodied and had injuries to his neck and face. He told the officers that appellant was responsible for his injuries.

Michael provided a written statement to Las Vegas police officers: "'Arrived at Caesar's at 2:15. Room not ready. By the time the room was ready, my wife and I got separated. Finally got back to the room, found my wife crying. She was very upset at me for not being there for her, so she started yelling and slapping me. Then I had to try—restrain her from hitting me and slapping me. Restrained her by holding her arms.'"

Counsel argued the statement should be excluded under *Crawford* and Evidence Code section 1370. The trial court allowed the statement, reasoning there was sufficient indicia of reliability based on corroboration found in the hotel security officer's observation of Michael's emotional state some 20 to 30 minutes earlier, Michael's physical injuries, and appellant's own statement to the police on videotape. The court concluded that it would be fundamentally unfair to allow the jury to hear only appellant's version of the incident.

Officer John Schutt of the Las Vegas Metropolitan Police Department testified that he and his partner went to Caesars Palace on a domestic disturbance call. After speaking to security officers, he spoke with Michael. Officer Schutt read Michael's

written statement (quoted above) to the jury. He also testified that Michael told him appellant had slapped him.

"'*Crawford* . . . held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1007.) "While the high court declined to precisely define what constitutes a 'testimonial' statement, it held that, at a minimum, testimonial statements include ' . . . police interrogations.' (*Crawford, supra*, 541 U.S. at p. 68.)" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 812.) Michael's statements while being questioned by Officer Schott are testimonial and therefore *Crawford* applies here. (*Davis v. Washington* (2006) 547 U.S. 813, 819-824; *People v. Cage* (2007) 40 Cal.4th 965, 984.)

In a *Crawford* analysis, the first question "is whether proffered hearsay would fall under a recognized state law hearsay exception." (*People v. Cage, supra,* 40 Cal.4th at p. 975, fn. 5.)[1] Here, the admissibility of Michael's statements implicates the forfeiture by wrongdoing exception to *Crawford* previously recognized by California courts. Under this exception, a witness's unconfronted testimonial statement may be used if a judge finds the defendant committed a wrongful act that rendered the witness unavailable to testify at trial. (See *Giles v. California* (2008) 128 S.Ct. 2678, 2682.) After appellant's trial, the United States Supreme Court concluded that the California theory of forfeiture by wrongdoing is not based on a founding era exception to the confrontation right because it did not require the trial court to determine that the defendant "engaged in conduct designed to prevent the witness from testifying" as the common-law doctrine required at the time of the founding. (*Id*. at pp. 2683-2684)

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[1] As the *Crawford* court put it, "the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (541 U.S. at p. 54.)

No such determination was made here. Respondent recognizes the error and suggests that either the trial court should be permitted to make such a finding on remand, or that the error was harmless.

"Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. [Citation.] 'Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' [Citation.] The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 608.)

Appellant repeatedly admitted killing Michael, confessing to the crime in a 9-1-1 call, at the scene, and at the sheriff's station. She was found lying next to Michael's dead body on top of the shotgun. In addition to the Las Vegas incident, evidence was admitted of three other episodes of mutual combat between appellant and Michael. On this record, the error in admitting Michael's statements about the Las Vegas evidence was harmless beyond a reasonable doubt.

II

Expert psychologists testified for both the defense and prosecution. Since the expertise of each is relevant to our discussion, we provide a procedural background.

The defense was first to call a clinical and forensic psychologist, Dr. Nancy Kaser-Boyd. The prosecutor objected to any testimony about the physiological impact of an adrenaline rush on the ground that Dr. Kaser-Boyd is not a neuropsychological expert. The court observed that Dr. Kaser-Boyd said that she had taken numerous courses on physiology, but that she was really called to testify about psychology. The court expressed doubt as to the relevance of testimony about the physiology of adrenaline. The prosecutor argued that the only relevant topic for Dr. Kaser-Boyd was appellant's battered woman syndrome defense.

Following a recess, the prosecutor renewed her objection that Dr. Kaser-Boyd was not qualified to testify about how adrenaline works in the body because she is not an expert in neuroanatomy, neurophysiology, or neurochemistry. Defense counsel responded that she was "not particularly interested in the biology of the thing, . . ." She indicated that her examination in this regard would be limited to a "very basic . . . probably one-question way of segueing into the issue of how fear makes a person to react, . . ." The court said that counsel and the witnesses were aware of the rules limiting the testimony of the psychologists and that defense counsel said she would not go into the biology issue.

On direct examination, Dr. Kaser-Boyd testified that a doctorate in psychology requires five or six years of graduate education, including courses in abnormal psychology, physiology, brain behavior, relationships, psychological testing, therapy and statistics. She had a year of post-doctoral medical school training on forensic psychology at the University of Southern California Institute of Psychiatry and Law. She had practiced for 25 years, and is board certified by the American Board of Assessment Psychology. Dr. Kaser-Boyd was an associate clinical professor at the UCLA medical school, a visiting lecturer at the University of Southern California, and has lectured at the law school and psychology department She had done work in the area of battered woman syndrome.

Dr. Kaser-Boyd testified in detail about the nature of battered woman's syndrome. She evaluated appellant and concluded that she suffered from battered woman's syndrome. When the defense attorney asked about the physiological reaction to a threat, the prosecutor objected on the ground the witness was not qualified to answer the question. The trial court indicated that Dr. Kaser-Boyd could testify about how a certain mental disease or disorder causes someone to act differently when confronted with a threat, but that she could not be asked about the biology of that reaction because that is irrelevant. Defense counsel argued it was relevant to appellant's mental state. The trial court ruled that the defense could bring out testimony that a battered woman would react differently than someone who has not been battered.

The prosecutor said she had asked to voir dire Dr. Kaser-Boyd under Evidence Code section 402 as to her qualifications, but had not been allowed to do so before her testimony began. The trial court excused the jury and allowed defense counsel to attempt to lay a foundation. Dr. Kaser-Boyd testified that she had training in physiology in graduate school, and continuing education courses regarding adrenaline and its effects on reaction to a threat. She had attended grand rounds at UCLA medical school which included lectures on the brain biology of fear and post traumatic stress disorder. Brain biology had been identified as a likely predictor of why certain people get post traumatic stress disorder and others do not. This training included education in the area of adrenaline and how it factors into a person's reaction to trauma. Dr. Kaser-Boyd had written on the biology of trauma.

On cross-examination at the Evidence Code section 402 hearing, the prosecutor established that Dr. Kaser-Boyd is not a neuropsychiatrist or neuropsychologist. She had two courses which included both subjects in graduate school. She had not received training in neurochemistry. According to Dr. Kaser-Boyd, a neuropsychologist would not be able to describe the neurology and biology of fear any differently than she does. Their course of training is not focused on fear and threat. She said she could not testify to how every aspect of the brain functions. The prosecutor renewed her objection that a neuropsychologist is required to testify to the impact of adrenaline. The court overruled the objection, finding that Dr. Kaser-Boyd had "enough specialized knowledge and experience in this area . . . to express an opinion on that issue." Defense counsel was cautioned not to ask whether appellant actually perceived that she was in danger or needed to defend herself.

The prosecutor again argued that the defense was attempting to "backdoor" evidence of mental disorder through this line of questioning, which was prejudicial because the prosecution had not had an expert evaluate appellant for such disorders. The trial court instructed counsel on the limited nature of the permissible examination. Dr. Kaser-Boyd then testified to the possible physiological reactions to a threat. She said a threat could cause people to be impulsive and focused on their own survival rather than

careful and thoughtful, leading to frantic or irrational behavior. Such a person could have a reaction that is more intense, more explosive.

In rebuttal, the prosecution called Barry Hirsch, a forensic psychologist who had practiced in that field for 25 years. When he went to graduate school, there was no subspecialty of forensic psychology. He specializes in risk assessment for physical and sexual violence and impulse control. He did not personally evaluate or interview the appellant, but reviewed the murder book, including police reports, scientific evidence, and audio taped interviews with appellant. He also reviewed two prior police reports in which appellant was listed as the victim, and two where Michael was listed as the victim. He reviewed Dr. Kaser-Boyd's written report and listened to her testimony in this case. Initially, defense counsel did not object to his qualifications.

Dr. Hirsch was asked: "And there was some testimony about some hypothesized adrenaline rush that happened and caused—potentially could cause somebody to make an impulsive decision. [¶] What can you tell us about that?" Defense counsel objected that the question misstated the testimony. That objection was overruled. Dr. Hirsch said: "Those opinions are usually reserved to neurologists, neuropsychiatrists, neuropsychologists. They involve the functioning of the limbic system, which is a portion of the brain that has within it a subsystem, the amygdala, that is thought . . . ." Defense counsel's objection for lack of foundation was sustained. Dr. Hirsch was asked, "Are you aware of that theory?" He answered, "I know the theory." He was asked, "And have you learned it and educated yourself on it?" He answered, "Yes." Defense counsel renewed her foundational objection which was overruled.

Dr. Hirsch then testified about the "limbic system." The term refers to the theory "that there is a very primitive portion of our brain that has stayed with us for thousands and thousands of years that, under certain situations, became activated and overruns cognitive—our ability to think and make judgments and decisions." Defense counsel's foundation objections were overruled. Dr. Hirsch went on to testify that there is a distinction between cognitive behavior and impulse control. He opined that the theory of fight or flight is outdated.

During a recess, defense counsel argued that Dr. Hirsch did not qualify as an expert to testify about these subjects. She contended the prosecution had elicited testimony by Dr. Hirsch that Dr. Kaser-Boyd was not qualified in this area, and that this rule should apply to Dr. Hirsch as well. The court ruled that the objection was not timely, and that in any event, Dr. Hirsch was as qualified as Dr. Kaser-Boyd.

On appeal, appellant argues Dr. Hirsch was not qualified to testify about the limbic system. Evidence Code section 801, subdivision (b) limits expert testimony to an opinion based "on matter (including his special knowledge, skill, experience, training, and education) . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, . . ." We review the trial court's decision to admit expert testimony for abuse of discretion. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 663.)

Respondent argues the defense objection to Dr. Hirsch's qualifications was untimely and that the issue is therefore forfeited. While defense counsel did not object while Dr. Hirsch was giving his general qualifications, she did object on the grounds of foundation when he was asked about the limbic system. The issue was preserved for appeal.

Given the limited testimony by Dr. Hirsch on the limbic system, we find no abuse of the trial court's discretion in its determination that each of the two psychological experts was qualified to testify about the subject of the limbic system and its impact on behavior in response to a threat. Neither expert was a medical doctor or a neuropsychiatrist or neuropsychologist.

III

Appellant argues the instructions on self-defense given by the trial court did not adequately inform the jury that "one who initiates a quarrel to create the need of self-defense may, if the victim responds with a sudden, unanticipated and deadly counterassault, use reasonable necessary force in self-defense." She argues: "There is no reason to treat one who initiates an assault different from one who contrives self-defense when both are confronted with sudden, unanticipated deadly force from the victim." She

contends that jurors are unlikely to distinguish "one contriving the need for self-defense from one initiating an assault" and that they "could erroneously conclude self-defense is unavailable to the initial aggressor when the victim responds in a sudden, unanticipated deadly counterassault."

Respondent argues that the issue was forfeited because appellant did not seek a clarifying or additional instruction. Appellant responds that the error implicated her right to due process and is thus preserved. We agree with appellant that the issue was preserved. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

The court gave CALCRIM No. 505 on self-defense. It also gave CALCRIM No. 3471: "A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if: [¶] 1. She actually and in good faith tries to stop fighting; [¶] AND [¶] 2. She indicates, by word or by conduct, to her opponent, in a way that a reasonable person would understand, that she wants to stop fighting and that she has stopped fighting; [¶] AND [¶] 3. She gives her opponent a chance to stop fighting. [¶] If a person meets these requirements, she then has a right to self-defense if the opponent continues to fight. [¶] *If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend herself with deadly force and was not required to stop fighting*." (Italics added.) CALCRIM No. 3472 was also given: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

Respondent argues that the italicized portion of CALCRIM No. 3471 adequately addressed the scenario raised by appellant. Read as a whole, the instructions informed the jury "that when the person who initiated the fight is met with sudden and deadly force and could not withdraw, that person may then respond with force." Appellant's response focuses on CALCRIM No. 3472. She contends that the italicized language in CALCRIM No. 3471 was not sufficient: "As to this instruction, jurors could not have been expected to distill the applicability of the last paragraph [of CALCRIM 3471] to CALCRIM 3472

especially since the two covered different situations; CALCRIM 3471 pertained to the initial aggressor and CALCRIM 3472 pertained to self-defense—not contrived."

"We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 (*Musselwhite*).) The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. (*Ibid.*) Further, in examining the entire charge we assume that jurors are '"""intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]'" [Citations.]'" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) In accordance with these standards, we conclude that the jury reasonably understood the italicized language in CALCRIM No. 3471 to modify the instruction given in CALCRIM No. 3472 which does not address the availability of self-defense to the original aggressor when the victim responds with deadly force.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J. MANELLA, J.